Attorney General, Malaysia v Manjeet Singh Dhillon

SUPREME COURT (KUALA LUMPUR) — CIVIL APPLICATION NO 08-26 OF 1989
HARUN HASHIM, MOHAMED YUSOFF AND GUNN CHIT TUAN SCJJ
5 NOVEMBER 1990

Civil Procedure — Contempt of court — Scandalizing a judge by criticizing his conduct — Attack on Lord President of Supreme Court — Affidavit filed in contempt proceedings against Lord President — Whether criticism would undermine authority of Lord President and lower the dignity of the court in the eyes of the public — What constitutes contempt of court — Applicability of English common law of contempt — Need to consider local conditions — Courts of Judicature Act 1964, s 13(1) — Civil Law Act 1956, s 3 — Federal Constitution, art 126

English Law — Common law of contempt, application of — Civil Law Act 1956, s 3

In this case the Attorney General applied to commit the respondent to prison for alleged contempt of court. It arose out of an affidavit affirmed by the respondent in support of an application for leave for an order of committal to prison of the Lord President of the Supreme Court for alleged contempt of the Supreme Court. The grounds on which the application was sought were stated to be:

(a) In para 7 of the said affidavit, the respondent herein alleged that the 'respondent (ie the Lord President) on 2 July 1988 did commit contempt of the Supreme Court by attempting to prevent, frustrate and interfere with the sitting of the Supreme Court' in connection with the application by YAA Tun Dato' Haji Mohamed Salleh bin Abas referred to therein.

(b) In para 9 of the said affidavit, the respondent accused the Lord President of 'abusing his official official position as Acting Lord President by taking the actions particularly described in paras 6(a) [sic] and (e) [sic] to prevent, frustrate and to interfere with a sitting of the Supreme Court to hear a matter in which the respondent [ie the Lord President] himself was a party thereto'. The respondent herein further alleged that 'As such, the aforesaid action of' the Lord President 'constitute contempt of court of the grossest imaginable. Contempt apart, the aforesaid conduct of the respondent [ie the Lord President] also constitutes misbehaviour within the meaning of art 125 of the Constitution, deserving his removal from office.'

(c) In para 11(a) of the said affidavit, the respondent accused that the Lord President, 'by using his position on [sic] the Acting Lord President interfered in the course and the administration of justice in the proceedings brought by Tun Dato' Haji Mohamed Salleh bin Abas.'

(d) In para 11(c) of the said affidavit, the respondent alleged that the conduct of the Lord President as described therein 'is an affront to the dignity and impartiality of the courts.'

(e) In para 11(d) of the said affidavit, the respondent alleged that the acts of the Lord President as described therein 'amount to an exercise of powers for improper motives and an interference with the course of justice.'

Held by a majority, allowing the application (Harun Hashim SCJ dissenting):

(1) The English common law principle of contempt of court is applicable in Malaysia by virtue of s 3 of the Civil Law Act 1956. Therefore any act done or writing published calculated to bring a court or a judge of the court into contempt or to lower his authority is a contempt of the court.

(2) When applying the law of contempt in Malaysia the court will not lose sight of local conditions and for the reason it would be necessary to take a stricter view here of matters pertaining to the dignity of the court.

(3) (Per Mohamed Yusoff SCJ) On the facts of this case the criticism made by the respondent if repeated would undisputably undermine the authority of the Lord President and lower the dignity of the court in the eyes of the public and therefore a contempt of court has been proven against the respondent.

Cases referred to
5 *A-G & Ors* v *Arthur Lee Meng Kuang* (folld)
11 *Lim Kit Siang* v *Dato Seri Dr Mahathir Mohamed* (folld)
6 *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors* v *SM Idris & Anor and another application* (folld)
4 *R* v *Gray* (folld)
12 *R* v *Metropolitan Police Commissioner, ex p Blackburn (No 2)* (folld)
14 *PP* v *Seeralan* (refd)
15 *Cheah Cheng Hoc* v *PP* (refd)
16 *Gallagher* v *Durack* (refd)
17 *SG* v *Radio Avon Ltd* (refd)
7 *Patrick Chokolingo* v *A-G of Trinidad & Tobago* (refd)
8 *In The Matter Of A Special Reference from the Bahama Islands* (refd)
9 *Debi Prasad Sharma* v *Emperor* (refd)
10 *Brahma Prakash* v *State of Uttar Pradesh* (refd)
11 *Lim Kit Siang* v *Dato Seri Dr Mahathir Mohamed* (folld)
18 *Surendra* v *Nabakrishna* (folld)
20 *Malaysian Bar* v *Tan Sri Dato Abdul Hamid Omar* (folld)
19 *R* v *Murphy* (folld)
20 *Re Wiseman* (folld)
21 *R* v *Collins* (folld)
22 *Raymond* v *Honey* (distd)
23 *A-G* v *Blomfield; A-G* v *Geddis* (refd)
24 *Leech* v *Dy Governor of Parkhurst Prison* (refd)
25 *Arthur Reginald Pereira* v *The King* (refd)
35 *Yusuf Ali Khan* v *State* (folld)
27 *State* v *Nityananda Mohapatra* (folld)
28 *State* v *Mujibur Rehman Sham & Ors* (folld)
29 *Government Pleader* v *Mathan Manjooran & Anor* (folld)
30 *PP* v *The Straits Times Press Ltd* (folld)
31 *PP* v *SRN Palaniappan & Ors* (folld)

(4) (Per Gunn Chit Tuan SCJ) On the facts of the case there was no justification for the criticisms in the affidavits affirmed by the respondent. There can be no doubt that the respondent intended to affirm the affidavits in question and there are statements in the affidavits containing accusations and allegations which were an attack on Justice Tun Dato' Abdul Hamid causing unwarranted aspersions on his character, which could be considered to be scurrilously abusive of the judge, thereby amounting to contempt by scandalizing the court.

Cases referred to
4 *R* v *Gray* (folld)
20 *Re Wiseman* (folld)
33 *Ambard* v *A-G for Trinidad and Tobago* (refd)
26 *Yusuf Ali Khan* v *State* (folld)
21 *R* v *Collins* (refd)
25 *Arthur Reginald Perera* v *The King* (refd)
33 *Re Ouellet* (refd)
34 *Re Bramblevale Ltd* (refd)
35 *State* v *Mir Abdul Qayum* (refd)

36 *State of Hyderabad* v *Natarajan* (refd)
27 *State* v *Nityananda Mohapatra* (refd)
37 *Vijaya Wickramatunga Vidyasagara* v *The Queen* (refd)
9 *Debi Prasad Sharma* v *Emperor* (refd)
10 *Brahma Prakash* v *State of Uttar Pradesh* (refd)
5 *A-G & Ors* v *Arthur Lee Meng Kuang* (folld)
6 *Trustees of Loong San Tong Khoo Kongsi (Penang)* v *SM Idris* (folld)
30 *PP* v *The Straits Times Press Ltd* (folld)
31 *PP* v *SRN Palaniappan & Ors* (folld)

(5) (Per Harun Hashim SCJ (dissenting)) The respondent has not crossed the line from libel to scandalizing the Lord President in his judicial capacity. Mere abuse of a judge, however defamatory, is not a contempt of court. The abuse must relate to the performance of a judicial duty of the judge for it to be a criminal contempt of the court. The offence alleged against the respondent has not been proved.

Cases referred to

1 *Tun Dato Haji Mohamed Salleh bin Abas* v *Tan Sri Dato Abdul Hamid bin Omar & Ors* (refd)
2 *Malaysian Bar* v *Tan Sri Dato Abdul Hamid bin Omar* (refd)
3 *McLeod* v *St Aubyn* (folld)
4 *R* v *Gray* (folld)
5 *A-G & Ors* v *Arthur Lee Meng Kuang* (refd)
6 *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors* v *SM Idris & Anor and another application* (folld)
7 *Patrick Chokolingo* v *A-G of Trinidad & Tobago* (folld)
8 *In The Matter Of A Special Reference From The Bahama Islands* (folld)
9 *Debi Prasad Sharma* v *Emperor* (folld)
10 *Brahma Prakash* v *State of Uttar Pradesh* (distd)

[Bahasa Malaysia summary

Didalam kes ini Peguam Negara telah memohon supaya responden dihukumkan penjara kerana apa yang dikatakan penghinaan kepada mahkamah. Perkara ini timbul dari afidavit yang diikrar oleh responden untuk menyokong permohonannya mendapat perintah supaya Ketua Hakim Negara di hukumkan penjara kerana apa yang dikatakan penghinaan kepada Mahkamah Agung. Permohonan itu dibuat atas alasan-alasan yang antara lain adalah:

(a) Didalam perenggan 7 afidavit itu responden berkata 'responden (iaitu Ketua Hakim Negara) pada 2 Julai 1988 telah melakukan penghinaan mahkamah dengan mencuba menghalang, mengecewa dan menggangu sidang Mahkamah Agung' berkenaan dengan permohonan Tun Haji Mohamed Salleh bin Abas yang disebutkan disitu.
(b) Didalam perenggan 9 afidavit itu, responden telah menuduh Ketua Hakim Negara menyalahgunakan jawatan rasmi beliau sebagai Pemangku Ketua Hakim Negara dengan mengambil beberapa tindakan yang disenaraikan didalam perenggan 6 untuk menghalang, mengecewakan dan menggangu sidang Mahkamah Agung untuk mendengar perkara dimana responden (iaitu Ketua Hakim) sendiri adalah pihaknya. Responden juga mendakwa 'Dengan demikian perbuatan Ketua Hakim itu menjadi penghinaan mahkamah yang sangat melampau. Selain dari penghinaan, perbuatan responden (Ketua Hakim itu) adalah perangai buruk seperti yang dimaksudkan oleh per 125 Perlembagaan, yang melayakan beliau dipecat dari jawatan beliau.'
(c) Didalam perenggan 11(a) afidavit itu, responden menuduh Ketua Hakim 'dengan menggunakan jawatan beliau itu sebagai Pemangku Ketua Hakim, telah menggangu perjalanan dan pentadbiran keadilan didalam prosiding yang dibawah oleh Tun Dato Haji Mohamed Salleh bin Abas.'
(d) Didalam perenggan 11(c) afidavit itu responden telah berkata kelakuan Ketua Hakim itu yang disebut itu 'adalah perbuatan menghina kedudukan dan kesaksamaan mahkamah'.
(e) Didalam perenggan 11(d) affidavit itu, responden telah berkata perbuatan-perbuatan Ketua Hakim seperti yang disebut itu 'menjadi penggunaan kuasa dengan niat tidak baik dan suatu gangguan kepada perjalanan keadilan.'

Diputuskan oleh majoriti, membenarkan permohonan itu (Harun Hashim HMA bertentangan):

(1) Prinsip undang-undang common law Inggeris mengenai penghinaan mahkamah adalah terpakai di Malaysia mengikut s 3 Akta Undang-Undang Sivil 1956. Oleh kerana itu apa-apa perbuatan yang dilakukan atau tulisan yang disiarkan yang bertujuan menghinakan mahkamah atau hakimnya atau merendahkan autoritinya adalah penghinaan kepada mahkamah.

(2) Apabila menggunakan undang-undang penghinaan mahkamah di Malaysia, mahkamah tidak akan mengabaikan keadaan tempatan dan oleh kerana itu adalah perlu mengambil pandangan yang lebih berat mengenai kehormatan mahkamah.

(3) (Oleh Mohamed Yusoff HMA) Atas fakta-fakta kes ini kritikan yang dibuat oleh responden jika diulangkan pasti akan melemahkan autoriti Ketua Hakim Negara dan merendahkan kehormatan mahkamah dipandangan orang ramai dan oleh kerana itu penghinaan mahkamah telah dibukti terhadap responden.

(4) (Oleh Gunn Chit Tuan HMA) Atas fakta-fakta kes ini tidak ada alasan bagi kritikan yang disebut didalam afidavit yang diikrarkan oleh responden. Tidak syak lagi responden bertujuan mengikrar afidavit itu yang mengandungi tuduhan dan kata-kata yang menjadi serangan terhadap Hakim Dato Abdul Hamid yang menimbulkan umpatan yang tidak berasas, yang boleh dianggapkan sebagai penghinaan dan yang menggunakan perkataan yang kotor dan keji terhadap seorang hakim, dan ini adalah menjadi penghinaan dengan menjatuhkan maruah mahkamah.

(5) (Oleh Harun Hashim HMA bertentangan) Responden belum lagi melintas garisan antara fitnah dan menjatuhkan maruah Ketua Hakim didalam sifatnya sebagai hakim. Mencaci-maki seorang hakim, walaupun menjadi mengfitnahkannya, bukanlah penghinaan kepada mahkamah. Caci-maki hendaklah berkait dengan tugasnya sebagai hakim untuk menjadikan perkara itu kesalahan penghinaan mahkamah. Kesalahan yang responden dituduhkan belum lagi dibukti.]

Complete list of cases referred to

1 *Tun Dato Haji Mohamed Salleh bin Abas* v *Tan Sri Dato Abdul Hamid bin Omar & Ors* [1988] 3 MLJ 149
2 *Malaysian Bar* v *Tan Sri Dato Abdul Hamid bin Omar* [1989] 2 MLJ 281
3 *McLeod* v *St Aubyn* [1899] AC 549
4 *R* v *Gray* [1900] 2 QB 36
5 *A-G & Ors* v *Arthur Lee Meng Kuang* [1987] 1 MLJ 207
6 *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors* v *SM Idris & Anor and another application* [1990] 1 MLJ 273
7 *Patrick Chokolingo* v *A-G of Trinidad and Tobago* [1981] 1 WLR 107
8 *In The Matter of a Special reference from the Bahama Islands* [1893] AC 138

9 *Debi Prasad Sharma* v *Emperor* AIR 1943 PL 202
10 *Brahma Prakash* v *State of Uttar Pradesh* AIR 1954 SC 10
11 *Lim Kit Siang* v *Dato Sri Dr Mahathir Mohamed* [1987] 1 MLJ 383
12 *R* v *Metropolitan Commissioner, ex p Blackburn (No 2)* [1968] 2 All ER 319
13 *R* v *Kopyto* 47 DLR 213
14 *PP* v *Seeralan* [1985] 2 MLJ 30
15 *Cheah Cheng Hoc* v *PP* [1986] 1 MLJ 299
16 *Gallagher* v *Durack* (1983) 45 ALR 53
17 *SG* v *Radio Avon Ltd* [1978] 1 NZLR 225
18 *Surendra* v *Naba Krishna* AIR 1958 Orissa 168
19 *R* v *Murpy* (1969) 4 DLR (93d) 289
20 *Re Wiseman* [1969] NZLR 55
21 *R* v *Collins* [1954] VLR 46
22 *Raymond* v *Honey* [1982] 1 All ER 756
23 *A-G* v *Blomfield; A-G* v *Geddis* [1914] NZLR 545
24 *Leech* v *Dy Governor of Parkhursh Prison* [1988] 1 AC 533
25 *Arthur Reginald Pereira* v *The King* [1951] AC 482
26 *Yusuf Ali Khan* v *State* PLD 970 SC 350
27 *State* v *Nityananda Mohapatra* AIR 1960 Orissa 132
28 *State* v *Mujibur Rehman Shami & Ors* PLD 1973 Lah 1
29 *Government Pleader* v *Mathai Manjooran & Anor* AIR 1959 Kerala 266
30 *PP* v *The Straits Times Press Ltd* [1949] MLJ 81
31 *PP* v *SRN Palaniappan & Ors* [1949] MLJ 246
32 *Ambard* v *AG for Trinidad and Tobago* [1936] AC 322
33 *Re Ouellet* 67 DLR 73
34 *Re Bramblevale Ltd* [1970] 1 Ch 128
35 *State* v *Mir Abdul Qayum* PLD 1964 Lah 661
36 *State of Hyderabad* v *Natarajan* AIR 1954 Hyd 180
37 *Vijaya Wickramatunga Vidyasagara* v *The Queen* [1963] AC 12

Legislation referred to
Civil Law Act 1956 s 3(1)
Courts of Judicature Act 1964 s 13(1)
Federal Constitution art 126
Rules of the High Court 1980 O 52

Abu Talib Othman (Attorney General) (*R Selventhirananthan* (Senior Federal Counsel) with him) for the applicant.
Raja Abdul Aziz Addruse (*Darryl Goon, CV Das, Jagjit Singh* and *GTS Sidhu* with him) for the respondent.
S Theivanthiran watching brief for the Bar Council.
Ghazi Ishak watching brief for the intervenors.

Cur Adv Vult

Harun Hashim SCJ (delivering the dissenting judgment): This is an application by the Attorney General to commit the respondent to prison for alleged contempt of court. It arises out of an affidavit affirmed by the respondent on 25 April 1989 and filed in this court in support of an application for leave for an order of committal to prison of the Lord President of the Supreme Court (Tun Dato Abdul Hamid bin Omar) for alleged contempt of this court.

The grounds on which this application is sought is the alleged conduct of the respondent in making various accusations and allegations in the aforesaid affidavit as set out hereunder against the Lord President who was at the material time the acting Lord President and the Chief Justice of the High Court of Malaya:

(a) In para 7 of the said affidavit, the respondent herein alleged that the 'respondent [ie the Lord President] on 2 July 1988 did commit contempt of the Supreme Court by attempting to prevent, frustrate and interfere with the sitting of the Supreme Court' in connection with the application by YAA Tun Dato' Haji Mohamed Salleh bin Abas referred to therein.
(b) In para 9 of the said affidavit, the respondent accused the Lord President of 'abusing his official position as Acting Lord President by taking the actions particularly described in paras 6(a) [sic] and (e) [sic] to prevent, frustrate and to interfere with a sitting of the Supreme Court to hear a matter in which the respondent [ie the Lord President] himself was a party thereto'. The respondent herein further alleged that 'As such, the aforesaid action of' the Lord President 'constitute contempt of court of the grossest imaginable. Contempt apart, the aforesaid conduct of the respondent [ie the Lord President] also constitutes misbehaviour within the meaning of art 125 of the Constitution, deserving his removal from office.'
(c) In para 11(a) of the said affidavit, the respondent accused that the Lord President, 'by using his position on [sic] the Acting Lord President interfered in the course and the administration of justice in the proceedings brought by Tun Dato' Haji Mohamed Salleh bin Abas.'
(d) In para 11(c) of the said affidavit, the respondent alleged that the conduct of the Lord President as described therein 'is an affront to the dignity and impartiality of the courts.'
(e) In para 11(d) of the said affidavit, the respondent alleged that the acts of the Lord President as described therein 'amount to an exercise of powers for improper motives and an interference with the course of justice.'

The Attorney General contends that the conduct of the respondent in making the accusations and allegations as set out above amounts to scandalizing the Lord President in his judicial capacity and warrants the committal of the respondent to prison for contempt of court.

The respondent admits that he affirmed the affidavit and did so on behalf of the Malaysian Bar and in his capacity as Secretary of the Bar Council. He contends that the statements made by him are true; the comments and criticisms are fair; and are wholly justified in the circumstances.

The events leading up to 2 July 1988 may be summarized from the agreed facts as found in the affidavits and annexures thereto as follows. Tun Mohamed Salleh Abas, who was at the material time the Lord President, considered that several statements made by the Prime Minister over a period of more than one year preceding March 1988 were repeated attacks on the judiciary and its members. He in turn made a series of speeches on the role and function of the judiciary. On 17 March 1988 the Prime Minister, speaking in Parliament made a statement which in the opinion of Tun Mohamed Salleh was a broad ranged attack on the judiciary. On 25 March 1988 he called a meeting of judges resident in Kuala Lumpur. On 26 March 1988, Tun Mohamed Salleh sent letters to His Majesty The Yang di-Pertuan

Agung and Their Royal Highness the Rulers expressing his feelings 'and that of all the judges of the country' regarding the development in the relationship between the executive and the judiciary and the disappointment 'with the various comments and accusations' made by the Prime Minister against the judiciary, not only outside but within Parliament. He hoped that the Yang di-Pertuan Agung would put a stop to 'all those unfounded allegations'.

On 1 May 1988 when the Prime Minister had an audience with the Yang di-Pertuan Agung, he was commanded to take appropriate action against Tun Mohamed Salleh on account of the letters. On 5 May 1988 the Prime Minister wrote to the Yang di-Pertuan Agung that on the the advice of the Attorney General, no action could be taken except under art 125(3) of the Federal Constitution. He, however, said he would investigate if there were grounds for the removal of Tun Mohamed Salleh. On 25 May 1988 the Prime Minister represented to the Yang di-Pertuan Agung that Tun Mohamed Salleh was no longer able to properly discharge his functions as Lord President and ought to be removed from office. The Yang di-Pertuan Agung was required to appoint a tribunal and in the meantime advised the Yang di-Pertuan Agung to suspend Tun Mohamed Salleh from exercising his functions with effect from 26 May 1988 pending the report of the tribunal. On the same day the Yang di-Pertuan Agung replied that he had considered the Prime Minister's representation and agreed to the establishment of a tribunal and to the suspension of Tun Mohamed Salleh with effect from 26 May 1988.

On 27 May 1988 at the request of the Prime Minister, Tun Mohamed Salleh met the Prime Minister at his office and was informed that the Yang di-Pertuan Agung was displeased with the letters and that a tribunal would be appointed. Tun Mohamed Salleh said that he would not resign but was willing to face the tribunal. Later that day he was served a letter from the Prime Minister that he had been suspended.

On 28 May 1988 Tun Salleh wrote to the Prime Minister that he had reconsidered the matter and offered to retire immediately. On the same day the Prime Minister replied that he had no objection to Tun Mohamed Salleh taking all leave prior to retirement and arrangements would be made for his retirement. On 29 May 1988 Tun Mohamed Salleh wrote to the Prime Minister withdrawing his offer of early retirement. Soon thereafter it became public knowledge that Tun Mohamed Salleh had been suspended and that a tribunal would be appointed.

On 3 June 1988 the Bar Council issued a press statement that the tribunal to be appointed should consist of judges who are senior to Tun Mohamed Salleh. A delegation of the Bar Council which included the respondent called upon Tan Sri Dato Abdul Hamid to advise him not to accept appointment as a member of the proposed tribunal, if chosen, on the grounds of likelihood of bias as he would be the logical successor to Tun Mohamed Salleh and also because he was one of the judges who attended the meeting on 25 March 1988.

On 11 June 1988 the Yang di-Pertuan Agung appointed a tribunal of six members with Tan Sri Dato Abdul Hamid as chairman. On 17 June 1988 Tun Mohamed Salleh was informed that the hearing would commence on 27 June 1988. On the same day the Bar Council issued a press statement that the appointment of the tribunal was not in accordance with the Constitution; and that in the opinion of the Bar Council the appointees should not accept the appointment and proposed that the Yang di-Pertuan Agung be advised to reconstitute the tribunal or alternatively the matter be referred to the Conference of Rulers 'because of the special circumstances of the matter which involve the Prime Minister personally as well as the Lord President'.

On 18 June 1988 the Malaysian Bar at an extraordinary general meeting passed certain resolutions including adoption of the Bar Council's press statement of 17 June 1988 and particularly as concerns the present case that Tan Sri Dato Abdul Hamid should relinquish appointment on the tribunal. On 22 June 1988 the tribunal received a letter from the solicitors of Tun Mohamed Salleh objecting to the composition of the tribunal. Tan Sri Dato Abdul Hamid as chairman wrote to the Prime Minister on the same day drawing his attention to the said objection and that unless a contrary direction is given the tribunal would continue to perform its functions; and to advise His Majesty accordingly. It would appear that no contrary direction was issued.

The tribunal was to commence hearing on 27 June 1988 but at the request of Tun Mohamed Salleh it was postponed to 29 June 1988. On 28 June 1988 Tun Mohamed Salleh applied ex parte to the High Court at Kuala Lumpur for leave to apply for an order of prohibition to stop the tribunal from proceeding with its enquiry on the ground that it had not been validly constituted and therefore had no jurisdiction to enquire. This application was fixed for hearing on 1 July 1988. The tribunal commenced hearing on 29 June 1988 and Tun Mohamed Salleh again asked for a postponement in view of the ex parte application. The tribunal, however, proceeded with the hearing. On 1 July 1988 the High Court commenced hearing the ex parte application which continued to the following day 2 July 1988, a Saturday, when the learned judge said he wished to hear the Attorney General and adjourned further

hearing to Monday 4 July 1988. Tun Mohamed Salleh's counsel then made an oral application for an interim order to restrain the tribunal from proceeding which was rejected by the learned judge.

It appears that Tun Mohamed Salleh and his solicitors were under the impression from press reports that the tribunal was completing its enquiry and would be submitting its report to His Majesty during the weekend. So counsel for Tun Mohamed Salleh made an oral application to Tan Sri Wan Suleiman SCJ (as he then was) for a special sitting of the Supreme Court at Kuala Lumpur to hear an urgent application for an interim order. Tan Sri Wan Suleiman SCJ sat with four other Supreme Court judges to hear the application and granted it. The order was served on the tribunal on the same day.

Now, on 2 July 1988 a scheduled sitting of the Supreme Court was to commence at Kota Bharu at which Tan Sri Wan Suleiman was to preside. He did not proceed to Kota Bharu as he was of the view that being the most senior Supreme Court judge after the Lord President and the two Chief Justices he should remain in Kuala Lumpur to attend to an urgent application 'of national importance' should it arise. He was obviously referring to the ex parte application of Tun Mohamed Salleh in the High Court. Tan Sri Dato Abdul Hamid held the view that as acting Lord President, only he could convene a special sitting of the Supreme Court. So when it became apparent that there was a possibility that a special sitting of the Supreme Court may be convened without his authority he issued instructions to the Chief Registrar that the court staff should not attend and assist such a sitting, if convened, unless authorized by him. Tan Sri Wan Suleiman and the other four judges were informed by the Chief Registrar of this when they decided to accede to the request of Tun Salleh's solicitors for a special sitting that Saturday morning. They nevertheless held the sitting and made the interim order.

On 6 July 1988, the five Supreme Court judges who sat on 2 July 1988 were suspended on the representation made by Tan Sri Dato Abdul Hamid alleging misbehaviour on their part. On the same day the five Supreme Court judges issued a press statement explaining the reasons for their sitting on 2 July 1988. That statement included the following passage:

> We would add that when we sought to sit in court we were informed by the Chief Registrar of the Supreme Court, Haider bin Mohd Noor, that instructions have been given by Tan Sri Abdul Hamid bin Hj Omar, the Acting Lord President, that none of the court staff should be present in court and the court doors should not be opened and we should not have the use of the facilities of the court including the Seal of the Supreme Court. In those circumstances it even became necessary for Tan Sri Wan Suleiman himself as the presiding judge to sign the order which we made which in fact should have been the duty of the Chief Registrar of the Supreme Court.

On 7 July 1988, the Bar Council issued a press statement stating that it was 'grossly improper conduct' for Tan Sri Dato Abdul Hamid to attempt to deprive the five judges from hearing the application. On 9 July 1988, the Malaysian Bar convened an extraordinary general meeting and passed a resolution calling upon the resignation of Tan Sri Dato Abdul Hamid or for his removal from the office of acting Lord President, the office of the Chief Justice of Malaya and as judge; and for legal proceedings to be instituted to commit him to prison for contempt of court. On 18 March 1989, the Malaysian Bar at an annual general meeting resolved that the contempt proceedings against Tan Sri Dato Abdul Hamid be instituted without any further delay. On 30 March 1989, the respondent, as secretary of the Bar Council, wrote to the Attorney General to enquire if he was instituting contempt proceedings against Tan Sri Dato Abdul Hamid over the alleged attempt to obstruct the court sitting of 2 July 1988. The Attorney General replied on 6 April 1989 that in view of the finding of the tribunal (which had been appointed on 12 August 1988 to enquire into the alleged misbehaviour of the five Supreme Court judges who sat on 2 July 1988 and had submitted its report of 23 September 1988 to the Yang di-Pertuan Agung) that the sitting was unlawful and that therefore Tan Sri Dato Abdul Hamid was merely attempting to prevent an unlawful sitting of the court, he was not instituting any proceedings against Tan Sri Dato Abdul Hamid as to do so would be 'frivolous, vexatious and an abuse of the process of the court'.

The proceedings against Tan Sri Dato Abdul Hamid were first filed on 11 April 1989 but were subsequently withdrawn by reason of the requisition of some members of the Malaysian Bar for an extraordinary general meeting to reconsider the resolution. On 22 April 1989 the Malaysian Bar at an extraordinary general meeting resolved to stand by its decision of 9 July 1988. And so on 24 April 1989, the Malaysian Bar applied for leave for an order of committal to prison of Tan Sri Dato Abdul Hamid for alleged contempt of court committed on 2 July 1988. The application was supported by a statement dated 25 April 1989 and the affidavit of the respondent affirmed on 25 April 1989 which is the subject-matter of the present case.

The facts show the attitude and stand of the Malaysian Bar and the Bar Council with regard to the events leading up to the removal of Tun Mohamed Salleh from office and the aftermath suspension of five Supreme Court judges. In the beginning, there was general concern of the Bar to protect the independence of the judiciary which it believed was being threatened by the

Prime Minister. Subsequently its efforts were more particularly directed at how to prevent the removal from office of Tun Mohamed Salleh. Whilst these efforts were in progress, their attention was further directed at preventing the removal from office of the five Supreme Court judges. Their efforts failed. Tun Mohamed Salleh was eventually removed from office on 8 August 1988: [1988] 3 MLJ xxxiii; and two of the Supreme Court judges who sat on 2 July 1988, were also removed from office on 6 October 1988. It is, however, clear that throughout these events the Malaysian Bar was strongly opposed to Tan Sri Dato Abdul Hamid personally in respect of three matters: (a) his appointment as chairman of the tribunal that enquired into the allegation of misbehaviour of Tun Mohamed Salleh Abas; (b) his alleged attempt to prevent the sitting of 2 July 1988; (c) his representation for the removal of five Supreme Court judges who sat on 2 July 1988; and hence the resolution of the Malaysian Bar of 9 July 1988 calling for his immediate resignation or removal from the Bench. This too has not happened. Tan Sri Dato Abdul Hamid has not resigned. He was appointed Lord President on 10 November 1988: [1989] 1 MLJ i. He was conferred with the First Class Order of Seri Setia Mahkota which carries the title of 'Tun' by His Majesty on 7 June 1989: [1989] 3 MLJ xvii. The only resolution of the Malaysian Bar of 9 July 1988 that is left is the institution of contemp proceedings against the Lord President which is based on his alleged attempt to prevent the sitting of 2 July 1988.

This court in *Tun Dato Haji Mohamed Salleh bin Abas* v *Tan Sri Dato Abdul Hamid bin Omar & Ors*[1] on 22 July 1988 in respect of the interim order made by the five Supreme Court judges on 2 July 1988 restraining the tribunal from submitting any recommendations, report or advice respecting the inquiry to the Yang di-Pertuan Agung held at p 150:

> The Supreme Court is principally an appellate court with appellate jurisdiction (see *Assa Singh* v *Mentri Besar, Johore* [1969] 2 MLJ 30). An amendment was made to art 121(2)(c) of the Federal Constitution effective from 1 January 1985. But no substantive law has been passed by Parliament to confer other powers than those already found in the Courts of Judicature Act 1964. Therefore there has been no real change since the *Assa Singh* case.
>
> The really vital issue here, however, is whether an interim order in the nature that we have before us now should have been made at all. To resolve that we have to go back to basic principles.
>
> The functions of the tribunal appointed under art 125(3) of the Constitution is to inquire and investigate on the representation and then report to the Yang di Pertuan Agung with any recommendation it may make. The tribunal is a body which investigates and does not decide. It is performing a constitutional function. The tribunal should not therefore be restrained from performing its constitutional function.
>
> Finally, the members of the tribunal are appointees of the Yang di-Pertuan Agung. From the language of art 125 it is clear that the Yang di-Pertuan Agung is entitled to the report of the tribunal. To restrain the tribunal from submitting their report is in effect to restrain His Majesty from receiving the report.
>
> On the above grounds it is our view that the restraining order is therefore bad in law, invalid and unenforceable as against the Yang di-Pertuan Agung and the tribunal.

The order of 2 July 1988 was accordingly set aside.

In the application for leave for an order of committal by the Malaysian Bar against Tan Sri Dato Abdul Hamid, [*Malaysian Bar* v *Tan Sri Dato Abdul Hamid bin Omar*[2]] this court on 29 April 1989 held in dismissing the application at p 282:

> The tribunal dealt with the sitting of the five Supreme Court judges on 2 July 1988 and after considering ss 38 and 39 of the Courts of Judicature Act 1964 came to a finding 'that the Supreme Court which sat on 2 July 1988 was convened in contravention of ss 38 and 39 of the Courts of Judicature Act' and in the result 'the court was not a lawfully constituted court and so has no jurisdiction to make the purported order for interim stay': see pp 6 to 9 of the report of the tribunal. Again at p 73 of the report the tribunal found that the sitting of the five judges was 'illegal and without jurisdiction'.
>
> We have ourselves examined ss 38 and 39 of the Courts of Judicature Act and we have come to the same view, ie the sitting on 2 July 1988 was in contravention of ss 38 and 39 of the Courts of Judicature Act. In our view it is the Lord President alone or any person acting as Lord President who is entitled to convene and to empanel judges to constitute the Supreme Court for any sitting, whether scheduled or unscheduled. The powers of the Lord President under ss 38 and 39 of the Act are express statutory powers which cannot be exercised by others unless properly exercised under s 9(1) of the Act during illness or absence from Malaysia or owing to any other cause when the Lord President is unable to exercise the functions of his office. We read the words 'any other cause' in s 9(1) to relate to physical inability in the sense that the Lord President is unable to perform his functions.
>
> There was thus no lawful sitting of the Supreme Court on 2 July 1988. So we have to ask the ultimate question — contempt of what? Indeed it may even be argued that the respondent was perfectly entitled to prevent an unauthorized sitting of the Supreme Court in contravention of ss 38 and 39 of the Court of Judicature Act. What amounts to contempt are acts done calculated to obstruct or interfere with the lawful process of the court. See also the speech of Lord Wilberforce in *Raymond* v *Honey*.
>
> The facts set out in the affidavit on behalf of the Malaysian Bar and the report of the tribunal would also seem to contradict the allegations contained in the grounds. The judges went into court at 12.50pm which only means that the doors of the court were not closed. They sat for about half an hour assisted by the staff of the registry although the Chief Registrar was absent. After the hearing they granted an order which bore the seal of the Supreme Court which only means that the seal was made available and not denied from them. In our view all these would compel us to come

to one conclusion only and, that is, the instructions even if issued were never implemented.

Finally there has certainly been an inordinate delay in making the application. The resolution of the Malaysian Bar to institute proceedings for contempt was passed on 9 July 1988. The application for leave was filed on 24 April 1989. There was no explanation for the delay in the affidavit of the secretary of the Bar. The allegation of contempt is a serious matter and should be pursued within a reasonable time. The delay must be explained. In our view a lapse of nearly nine months unexplained in the affidavit is not reasonable. Motion dismissed.

At first flush, it may well be that ex facie the Lord President has committed a contempt of court by attempting to prevent a sitting of the Supreme Court. The respondent therefore had the right to criticize the conduct of the Lord President. The facts, however, as disclosed in the report of the tribunal that inquired into the representation against the five Supreme Court judges annexed to the affidavit of the respondent and in the impugned affidavit itself show (a) that the doors of the court-room were not locked on 2 July 1988; (b) the court staff attended to the sitting; (c) the judges sat and heard the application; and (d) the seal of the court was affixed to the order made by the judges.

It was the finding of the tribunal that the sitting of 2 July 1988 was an unlawful sitting. It was also the finding of this court on 22 July 1988, on the application of the Attorney General to set aside the interim order of 2 July 1988, that the court had no jurisdiction to entertain the application in the first place; and finally, this court held on 29 April 1989 that the sitting on 2 July 1988 was unlawful. All that the Lord President did when he gave his instructions to the Chief Registrar was to prevent an unlawful sitting of the Supreme Court and even then to await his further instructions if there was going to be a sitting. The Chief Registrar, however, did not refer back to the Lord President when he became aware that there was in fact going to be a sitting: exh P15(T) annexed to the report of the tribunal.

In answer to a query by the respondent, the learned Attorney General said that he was not going to institute legal proceedings against the Lord President for contempt of court as he had no grounds to do so.

On these facts, I am of the view that the Lord President has not committed contempt of court. In my judgment it is necessary to make this finding, not to vindicate the Lord President but in order to determine the contention of the respondent that he was justified in saying what he did because according to him the Lord President was guilty of contempt of court. It is also relevant to determine the conduct of the respondent in the matter before us.

It is common ground that the issue before the court is whether the statements made by the respondent in the affidavit affirmed on 25 April 1989 amount to scandalizing a judge as a judge and therefore a contempt of court.

Article 126 of the Constitution provides:

> The Supreme Court or a High Court shall have power to punish any contempt of itself.

And art 10 of the Constitution provides (in so far as it is relevant):

> (1) Subject to Clause (2) ...
>
> (a) every citizen has the right to freedom of speech and expression;
>
> ...
>
> (2) Parliament may by law impose —
>
> (a) on the rights conferred by paragraph (a) of Clause (1) ... restrictions designed to provide against contempt of court ...

No special law has been enacted under art 10(2) of the Constitution except the following provisions in s 13 of the Courts of Judicature Act 1964 which reads:

> (1) The Supreme Court shall have power to punish any contempt of itself.
> (2) The High Court shall have the power to punish any contempt of itself.

which merely repeat the constitutional provision.

In the absence of specific legislation, s 3 of the Civil Law Act 1956 applies. That section, in so far as it is relevant, reads:

> (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall —
>
> (a) in West Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April, 1956;
>
> ...
>
> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary. ...

What then is the position at common law. In *Mcleod* v *St Aubyn*,[3] Lord Morris in the Privy Council said at p 561:

> Committals for contempt of court are ordinarily in cases where some contempt ex facie of the court has been committed, or for comments on cases pending in the courts. However, there can be no doubt that there is a third head of contempt of court by the publication of scandalous matter of the court itself. Lord Hardwicke so lays down without doubt in the case of *In re Read & Huggonson* (1742). He says, 'One kind of contempt is scandalizing the court itself.' The power summarily to commit for contempt of court is considered necessary for the proper administration of justice.

In *R* v *Gray*[4] Lord Russell of Killowen CJ says as to what constitutes contempt of court at p 40:

> Any act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority, is a contempt of court. That is one class of contempt. Further any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the courts is a contempt of court. The former class belongs to the category which Lord Hardwicke CJ characterized as 'scandalizing a court or a judge'. That description of that class of contempt is to be taken subject to one and an important qualification. Judges and courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court. The law ought not to be astute in such cases to criticize adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen. Now, as I have said, no one has suggested that this is not a contempt of court, and nobody has suggested or could suggest, that it falls within the right of public criticism in the sense I have described. It is not criticism: I repeat that it is a personal scurrilous abuse of a judge as a judge.

At common law, therefore, personal scurrilous abuse of a judge as a judge is and always has been a contempt of court.

In *AG & Ors* v *Arthur Lee Meng Kuang*,[5] the respondent, an advocate and solicitor, had appeared for the plaintiffs in an application for declaratory orders and other reliefs against certain defendants. He won his case in the High Court but lost the appeal in the Supreme Court. The respondent subsequently wrote letters to three Supreme Court judges involved in the appeal. The letters were highly derisive of the Supreme Court. The respondent not only criticized the judgment of the Supreme Court but alleged that the decision of the court was unjust and biased. Mohamed Azmi SCJ speaking for this court said at p 208:

> In this country, the need to protect the dignity and integrity of the Supreme Court and the High Court is recognized by art 126 of the Federal Constitution and also by s 13 of the Courts of Judicature Act 1964. A proper balance must therefore be struck between the right of speech and expression as provided for in art 10 of the Federal Constitution and the need to protect the dignity and integrity of the Superior Courts in the interest of maintaining public confidence in the judiciary.

And on the same page continued:

> Whether a criticism is within the limits of reasonable courtesy and good faith must in our view depend on the facts of each particular case. In determining the limits of reasonable courtesy the court should not however lose sight of local conditions, a proposition laid down in *PP* v *The Straits Times Press Ltd* [1949] MLJ 81 and *PP* v *SRN Palaniappan & Ors* [1949] MLJ 246 where Spenser Wilkinson J hesitated, quite correctly, to follow too closely the decisions of English courts on the subject of contempt without first considering whether the relevant conditions in England and this country are similar.

In that case, this court accepted the common law principle as stated in *R* v *Gray*[4] and found the respondent guilty of contempt of court.

This court reiterated the same common law principle of contempt in *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors* v *SM Idris & Anor and another application*[6] where at p 277 the Lord President said:

> As advocates and solicitors they are both officers of the court and are expected to uphold the dignity of the court and the respect for the judges. But they have ridiculed the Supreme Court. We find that the first and second respondents had gone outside the two limits of reasonable courtesy and good faith. The blatant insinuations made by them had scandalized the Supreme Court and brought it into disrepute as they were not within the limits of reasonable courtesy and good faith. We find that the applicants have proven their case against them beyond reasonable doubt and we find both of them guilty of contempt of this court.

Before us it was urged that the contempt proceedings against the Lord President were taken to uphold the dignity and impartiality of this court and the due administration of justice. It was argued that the impunged affidavit contains no statement which scandalizes this court as a court. This is true. All the statements complained of by the Attorney General refer to the Lord President specifically. It is contended therefore that the respondent cannot be guilty of contempt of court. As authority for this proposition, reference was made to that part of Lord Diplock's speech in *Patrick Chokolingo* v *A-G of Trinidad and Tobago* (PC)[7] at p 111:

> 'Scandalizing the court' is a convenient way of describing a publication which, although it does not relate to any specific case either past or pending or any specific judge, is a scurrilous attack on the judiciary as a whole, which is calculated to undermine the authority of the courts and public confidence in the administration of justice.

I am of the view that the passage is not intended to mean that scandalizing the court is limited to cases where the criticism is directed at the judiciary as a whole only. Lord Diplock was clearly referring to the facts of that case where a journalist had written a short story in a newspaper entitled 'The Judge's Wife' which purported to be an account of a servant recently dismissed from a judge's household of the way in which the judge and his wife and, it was suggested, his fellow judges, habitually conducted themselves. A box heading to the story accurately summarized its contents: 'The old domestic was bent on exposing bribery, corruption and fraud in the household.' It will be noted that in *R* v *Gray*[4] the criticism was against a single judge.

It was further argued that the test to be applied in cases where it is not criticism of a judgment is the report

of the Privy Council in *In The Matter of a Special Reference from the Bahama Islands*.[8] In that case the Chief Justice of the Bahamas had addressed two letters to a newspaper which were published, on questions affecting the health of the town. Two days later, a letter addressed to the editor of the newspaper was published containing criticism of the Chief Justice. In essence the letter said the Chief Justice was a busybody to be concerned about public health, he was overpaid, underworked and overbearing. He had made himself out to be a virtuous man by announcing in open court that he refused to accept a gift of pineapples from a grateful litigant. The Chief Justice then summoned the editor of the newspaper to his chambers and required him to disclose the name of the writer of the letter and to hand over the manuscript. The editor refused. Whereupon the Chief Justice sentenced the editor to be kept in prison during the Chief Justice's pleasure for contempt of court and of his official position, for publishing the letter and also to pay a fine to the court, and to be imprisoned further until the fine is paid and a further fine for not disclosing the name of the writer and to be kept in prison until that fine was paid. The editor was sent to prison but was released by the Governor four days later. The question before the Privy Council was whether the editor was guilty of contempt of court for publishing the letter and the answer at p 301 was:

> That the letter signed 'Colonist' in the Nassau Guardian although it might have been made the subject of proceedings for libel was not, in the circumstances, calculated to obstruct or interfere with the course of justice or the due administration of the law, and therefore did not constitute a contempt of court.

It is obvious from the facts of that case the contempt proceedings emanated from the Chief Justice's letters written in his personal capacity and had nothing to do with the duties of a Chief Justice.

In *Debi Prasad Sharma* v *Emperor*[9] Lord Atkin in the Privy Council said at p 204:

> The cases of contempt which consists of 'scandalizing the court itself' are fortunately rare, and require to be treated with much discretion. In 1899 this Board pronounced proceedings for this species of contempt to be obsolete in this country, though surviving in other parts of the Empire: but they added it is a weapon to be used sparingly and always with reference to the administration of justice (*Mcleod* v *St Aubyn*).
>
> In 1893 (the *Bahama* case) the test applied by the very strong Board which heard the reference was whether the words complained of were in the circumstances calculated to obstruct or interfere with the course of justice and the due administration of the law. In 1900 (*R* v *Gray*) it was shown that the offence of scandalizing the court itself was not obsolete in this country. A very scandalous attack had been made upon a judge for his judicial utterances while sitting in a criminal case on circuit: and it was with the foregoing opinions on record that Lord Russell of Killowen LCJ adopting the expression of Wilmot CJ in his opinion in 1765 (*Rex* v *Almon*) which is the source of much of the present law on the subject, spoke of the article complained of as 'calculated to lower the authority of the judge'. When the comment in question in the present case is examined it is found that there is no criticism of any judicial act of the Chief Justice, or any imputation on him for anything done or omitted to be done by him in the administration of justice.

In that case, the Chief Justice of Allahabad was alleged to have issued a circular to subordinate judges to raise contributions to the War Fund. The story was published in a newspaper. It was not true. The publisher, printer and reporter were found guilty of contempt of court but the Privy Council held they were not for the reason stated. Here again, the act complained of had nothing to do with the Chief Justice exercising his powers as Chief Justice.

In *Brahma Prakash* v *State of Uttar Pradesh*,[10] the Bar Association, upon receipt of complaints from litigants and enquiry, passed a resolution that they had formed an opinion that two judicial officers were thoroughly incompetent in law, did not inspire confidence in their judicial work, were given to stating wrong facts when passing orders and were overbearing and discourteous to the litigant public and the lawyers alike. Copies of the resolution were sent to the superiors of the officers concerned. The meeting of the executive committee of the Bar Association was held in camera and no non-member was allowed to be present. The resolution was typed out by the President himself and the proceedings were not recorded in the minute book of the Bar Association. The High Court of Allahabad held that the allegations made against the judicial officers came within the category of contempt which is committed by scandalizing the court. On appeal, Mukherjea J speaking for the Supreme Court of India said at p 13:

> It admits of no dispute that the summary jurisdiction exercised by superior courts in punishing contempt of their authority exists for the purpose of preventing interference with the course of justice and for maintaining the authority of law as is administered in the courts. It would be only repeating what has been said so often by various judges that the object of contempt proceedings is not to afford protection to judges personally from imputations to which they may be exposed as individuals; it is intended to be a protection to the public whose interests would be very much affected if by the act or conduct of any party, the authority of the court is lowered and the sense of confidence which people have in the administration of justice by it is weakened.
>
> There are indeed innumerable ways by which attempts can be made to hinder or obstruct the due administration of justice in courts. One type of such interference is found in cases where there is an act or publication which 'amounts to scandalizing the court itself' — an expression which is familiar to English lawyers since the days of Lord Hardwicke: vide — *In re Read and Huggonson* 1742-2 Atk 469 at p 471 (B). This scandalizing might manifest itself in various ways but, in substance, it is an attack on individual

judges or the court as a whole with or without reference to particular cases casting unwarranted and defamatory aspersions upon the character or ability of the judges. Such conduct is punished as contempt for this reason that it tends to create distrust in the popular mind and impair confidence of people in the courts which are of prime importance to the litigants in the protection of their rights and liberties.

And at p 14:

The position therefore is that a defamatory attack on a judge may be a libel so far as the judge is concerned and it would be open to him to proceed against the libellor in a proper action if he so chooses. If, however, the publication of the disparaging statement is calculated to interfere with the due course of justice or proper administration of law by such court, it can be punished summarily as contempt. One is a wrong done to the judge personally while the other is a wrong done to the public. It will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice, or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties. It is well-established that it is not necessary to prove affirmatively that there has been an actual interference with the administration of justice by reason of such defamatory statement; it is enough if it is likely, or tends in any way, to interfere with the proper administration of law.

The court held at p 15:

What is material, is the nature and extent of the publication and whether or not it was likely to have an injurious effect on the minds of the public or of the judiciary itself and thereby lead to interference with the administration of justice.

and as the circumstances under which the representation was made did not have that effect, the contempt was only of a technical nature and allowed the appeal.

Finally reference was made to *Lim Kit Siang* v *Dato' Seri Dr Mahathir Mohamad*[11] and it was urged that we should adopt a liberal attitude here as was adopted in that case. The facts of that case are materially different from the present. In that case there was a general criticism of the interpretative function of the court by the Prime Minister in almost similar vein as that by the Right Honourable Quentin Hogg PCOCMP (later Lord Hailsham, the Lord High Chancellor) in his 'Punch' magazine article on the Court of Appeal see: *R* v *Metropolitan Commissioner, ex p Blackburn (No 2)*.[12]

We were also referred to numerous authorities from other jurisdictions by both parties. I do not propose to deal with each of these authorities as I am of the view that the common law as herethereto applied in this country applies and would only comment briefly as follows.

In view of art 10 of the Constitution, it was suggested that the American decisions should apply. I think not. The First Amendment to the Constitution of the United States guarantees freedom of speech to the extent that it cannot even be restricted by legislation. The American courts are quite clear that the free speech guarantee permits far greater criticism of judges as judges than would be allowed in England.

In Canada, *R* v *Gray*[4] applied until the Canadian Charter of Rights and Freedoms came into force by the Constitution Act of 1982 which guaranteed freedom of expression. In *R* v *Kopyto*,[13] the Ontario Court of Appeal quashed the conviction of a lawyer by a trial court for contempt of court by scandalizing the court on the ground that the statements were now protected by the guarantee to freedom of expression. This reasoning will not apply here in view of art 10(2) of the Constitution and s 3 of the Civil Law Act 1956.

In Pakistan, art 123 of the Constitution provides that the Supreme Court and the High Court shall have power to punish any person who 'scandalize the Court or otherwise does anything which tends to bring the Court or a Judge of the Court into hatred, ridicule or contempt' and is therefore much more protective of judges than under the common law.

In India, however, art 19 of its Constitution preserves the common law position by the words 'any existing law' and Indian decisions on the subject would be persuasive authority in this country.

In the instant case, the first fact to consider is that the criticism of the respondent is not directed at any judgment of this court whether present or pending or the judiciary as a whole or this court in particular but criticism of a judge as a judge in his capacity at the material time as the acting Lord President and the Chief Justice of the High Court of Malaya. The substance of the criticisms may be summarized as follows:

(a) the Lord President interfered in the due administration of justice by attempting to prevent and frustrate a litigant from seeking redress in the court;
(b) the Lord President abused his official position to protect his own personal interests and was himself guilty of contempt of court of the grossest imaginable;
(c) the conduct of the Lord President is an affront to the dignity and impartiality of the courts; and
(d) the Lord President was guilty of misbehaviour deserving his removal from office.

There can be no doubt that these statements are ex facie defamatory of the Lord President. The question is whether this defamatory attack is purely a libel for the Lord President to proceed against the respondent if he so chooses or has crossed the line to scandalizing the Lord President in his judicial capacity. Bearing in mind that the power to commit for contempt which consists of scandalizing a judge as a judge should be treated with much discretion and always with reference to the ad-

ministration of justice, it is necessary to determine, on the facts of each particular case, whether the line has been crossed. In so determining, it is also necessary to apply the common law according to the circumstances prevailing in this country (s 3 of the Civil Law Act 1956) and not what it would be in the United States, the United Kingdom or other common law countries.

The defamatory statements made by the respondent in his affidavit relate entirely to the single act of the Lord President in giving his instructions to the Chief Registrar to prevent a sitting of the Supreme Court on 2 July 1988. It was held by this court that that sitting was an unlawful sitting. There was therefore no court in existence for the Lord President to be guilty of contempt. The respondent therefore has made a false allegation. The statement itself is undoubtedly defamatory if only on account of its falsity but a defamatory statement against a judge by itself is not a contempt of court: *Patrick Chokolingo* v *A-G of Trinidad and Tobago*;[7] *Debi Prasad Sharma* v *Emperor*.[9]

It is contended that the statements made by the respondent amount to scandalizing the Lord President in his *judicial capacity*. To uphold this contention it must be shown that the Lord President was exercising some judicial power. It is not enough if the statements are made against *the person* of the Lord President only: *Re A Special Reference from the Bahama Islands*.[8] The instruction given to the Chief Registrar was not in exercise of judicial powers. At best it was advice not to sit. In any event they were not carried out. Indeed the Lord President did nothing on 2 July 1988 which was related to the administration of justice which could be the subject-matter of contempt proceedings against the respondent: *Mcleod* v *St Aubyn*.[3]

As the Lord President was not doing anything in his judicial capacity it was defamatory of the respondent to allege the Lord President of abusing his official powers, imputing improper motives, misbehaviour and interfering with the course of justice.

The statements made by the respondent are wholly unjustified. They are blatantly defamatory and must have caused acute embarrassment to the Lord President, more particularly in this case as the statements were preceded in a blaze of publicity as evident from the press statements issued, the several meetings of the Bar Council and the Malaysian Bar. In short, the Lord President has been publicly ridiculed. *Brahma Prakash*[10] may (subject to further argument) have applied to the facts of this case in so far as it casts aspersions on the integrity, ability and fairness of the Lord President in the discharge of his judicial duties which is likely to have an injurious effect on the minds of the public and confidence in the judiciary and thereby lead to interference with the administration of justice on account of the publicity generated by the Bar Council but then the Bar Council has not been made a party to these proceedings. The only material complained of is the affidavit affirmed by the respondent and filed in this court in the course of court proceedings. The extent of publication of such an affidavit is very limited and does not meet the test suggested in *Brahma Prakash*[10] at p 15.

I am of the firm opinion on the authorities I have referred to, that the respondent has not crossed the line from libel to scandalizing the Lord President in his judicial capacity. Mere abuse of a judge, however defamatory, is not a contempt of court. The abuse must relate to the performance of a judicial duty by the judge for it to be a criminal contempt of court. The offence alleged against the respondent has not been proved.

For the reasons stated, I would dismiss this application.

Mohamed Yusoff SCJ: I have had the advantage of reading Harun Hashim SCJ's final judgment last Saturday morning. I do not agree with the conclusion and would state my views as follows.

At the outset I would say that I do not agree with the contention of the respondent's counsel that the common law contempt of court as has hitherto been applied in this court by virtue of s 3 of the Civil Law Act 1956 is inconsistent with art 10(1) of the Federal Constitution.

The Supreme Court has this far consistently applied the common law principle of contempt of court as seen in the judgments in some of these cases viz: *A-G & Ors* v *Arthur Lee Meng Kuang*,[5] *Lim Kit Siang* v *Dato Seri Dr Mahathir Mohamed*,[11] and as recently as this year in *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors* v *SM Idris & Anor and another application*.[6] All these three cases dealt with contempt in scandalizing the court. I see no reason now to depart from these principles. Further, the common law, as has been expounded, applied and decided by our courts after 7 April 1956, by virtue of the Civil Law Act 1956, has become part of our law.

In *Arthur Lee*'s case,[5] the respondent there was cited for contempt of court in criticizing the judgment of the court. Mohamed Azmi SCJ accepted the common law principle of contempt of court as found in *R* v *Gray*,[4] and as applied by Salmon LJ in *R* v *Metropolitan Police Commissioner, ex p Blackburn (No 2)*.[12] With regard to the respondent's criticism of the judgment of the court he found the respondent had committed contempt. He followed the test as applied in *ex p Blackburn (No 2)*[12] that 'the criticism was beyond the limit of reasonable courtesy and good faith.'

In *SM Idris*'s case[6] Tun Abdul Hamid LP reiterated the same principle of common law of contempt and in

applying a similar test found two of the respondents in contempt of court.

Two other remaining judgments of this court in *PP* v *Seeralan*,[14] and in *Cheah Cheng Hoc* v *PP*,[15] relate to different categories of contempt of court. The first dealt with contempt in the face of the court — ex facie — and the second dealt with contempt for failure of the respondent to produce documents in court knowingly.

Turning to the present case, the respondent is cited for contempt for scandalizing a judge as a judge, indeed the highest judge in the country, by criticizing the conduct of the Acting Lord President (as he then was), in his affidavit of 25 April 1989.

For the reasons stated below, I am of the opinion that a contempt of court has been proven against the respondent.

The Attorney General contended that the grossest criticism made by respondent is at para 9 of his affidavit alleging against the Lord President in these words: 'contempt apart, the aforesaid conduct of the respondent (ie the Lord President) also constitutes misbehaviour within the meaning of art 125 of the Constitution deserving his removal from office'. Such allegation, it is submitted, amounts to scandalizing the Lord President in his judicial capacity.

The Attorney General said that such criticism by the respondent directly attacked the Lord President as to undermine the authority of the Lord President which would erode the confidence of the public in the judiciary.

On the law applicable to this case, I agree with the Attorney General that, as mentioned earlier, the principle of common law of contempt as stated in *R* v *Gray*[4] still applies in our country. Parliament has not imposed any restriction by law relating to contempt of court under art 10(2) of the Constitution. As such the common law provision under s 3 of the Civil Law Act 1956 is preserved.

I also agree that this is the present law applicable in Australia for scandalizing the court as seen in *Gallagher* v *Durack*,[16] and also in New Zealand, *SG* v *Radio Avon Ltd*,[17] though as pointed out by the respondent's counsel that this is not the same in Canada after 1982 with the specific legislation in Canadian Charter of Rights and Freedoms Act and in Pakistan and India with their constitutional provisions altering the course of common law contempt of court. But in this regard the Attorney General submitted that in the present case the test in *Arthur Lee*'s case[5] should apply that the respondent's remark was not made within the limit of reasonable courtesy and good faith. Both counsel for the respondent argued at length on the classification of contempt of court. I think it is better that a summary of their arguments be set down here.

Mr Cyrus Das in his submission said that the specie of contempt cited against the respondent in the present case is one which is not related to any specific case in court, either past or pending, or to any specific judge, but an allegation of a scurrilous attack on the judiciary as a whole as defined by Lord Diplock in *Patrick Chokolingo* v *A-G of Trinidad and Tobago*[7] at p 111. He submitted that the test for this specie of contempt is as laid down in *In The Matter of a Special Reference from the Bahama Islands*[8] at p 149, ie the criticism must be 'in the circumstances, calculated to obstruct or interfere with the course of justice or the due administration of the law'.

In that case the respondent was cited for contempt for writing letters which were published in newspapers criticizing the conduct of the Chief Justice who refused to accept a gift of pineapples from a successful litigant. A strong bench consisting of 11 Lords of Appeal sat in the referendum and found that the letter did not constitute contempt.

He submitted that this was the test followed by the Privy Council in *Debi Prasad Sharma* v *Emperor*[9] and applied by the Indian Supreme Court in *Brahma Prakash* v *State of Uttar Pradesh*.[10]

He further contended that this is the type of contempt the respondent in *Lim Kit Siang* v *Dato Seri Dr Mahathir Mohamed*[11] was cited for criticizing generally the interpretative function of the court.

On these authorities I agree with the respondent's counsel's proposition that the specie of contempt of court cited against the respondent in the present case is of the kind known as scandalizing the court itself.

The proof that is required to establish this type of contempt in scandalizing the court is stringent. In *Lim Kit Siang*'s case[11] this court has held that for proceedings for contempt constituting an attack on the judiciary require the strictest burden of proof. The proof that was envisaged in that case was as suggested by the applicant there. This was as laid down in *Surendra* v *Nabakrishna*,[18] ie 'Any act done, or writing published calculated to bring a court or the judge of a court into contempt, or to lower his authority, is a contempt of court.'

Or as another quorum of this court in *Malaysian Bar* v *Tan Sri Dato Abdul Hamid bin Omar*[2] at p 283, deciding on the respondent's expunged application for leave puts it 'what amounts to contempt are acts done calculated to obstruct or interfere with the lawful process of the court'.

The criticism made by the respondent in this case does not relate to any particular case in court but specifically directed at the Lord President's conduct in the exercise of his function. The words used in the criticism were: 'abusing his official position as Ag LP'; 'his acts

amount to exercise of powers for improper motives' and 'the conduct of the LP constitutes misbehaviour, deserving his removal from office.'

Citing *R* v *Murphy*,[19] *Re Wiseman*,[20] and *R* v *Collins*,[21] the Attorney General said that such criticism by the respondent reflected on the integrity, dignity and propriety of the Lord President which amounts to saying that the administration of justice was not safe in his hands, thus putting the whole judiciary into contempt which, in turn, would affect the public confidence in the court. He said that category of contempt belongs to scandalizing a court or a judge.

R v *Murphy*[19] is a Canadian case where a witness at trial published a letter in newspapers before judgment was delivered by the judge attacking the judge as self-convicting.

Re Wiseman[20] is a New Zealand case where the respondent in supporting his motion before the court filed four affidavits making violent accusations against the judges who heard the case in which the respondent was a party, alleging their partiality to the respondent's opponent and fabricated evidence against him.

Both these cases regard the criticisms in the proceedings before them were of the class of contempt described by Lord Hardwicke in *R* v *Gray*[4] as scandalizing a court or judge and that the test of legitimate criticism was applied, and in *R* v *Murphy*[19] it was further held that it was thus not necessary to show that the writing was calculated to interfere with the course of justice. Both of these findings are in my opinion relevant to the case of scandalizing a judge and in those circumstances interference need not be proved.

I would agree that *R* v *Collins*[21] supports the Attorney General's contention. There the respondent, Collins, had filed two affidavits as part of the material in a cause before the court. The affidavits contained allegations that the judge was partial and conspired with the respondent's opponents before him. The respondent also accused all judges of the court of 'strangling' his litigation and conducting a 'vendetta' against him and that a number of judges had 'massacred' his litigation without proper hearing and refused to give reasons for their decision.

In a well reasoned judgment Scholl J (exercising original jurisdiction) found that the matter complained of falls within the category of the class of contemptuous material calculated to embarrass a tribunal in arriving at its decision; and alternatively, the criticisms amount to contempt of scandalizing the court as being calculated to lower the authority of the court.

I would accept the finding in *R* v *Collins*[21] as persuasive. In my assessment of the case resting on the authorities cited, it is correct to say that the first contempt was committed in respect of criticism against the judge in his judicial capacity, in whose court the case was pending, and that the alternative contempt, calculated to interfere in the course of justice, described in *R* v *Gray*,[4] was established against the respondent in respect of his criticism scandalizing the court and all the judges generally in their duties.

The line of defence taken by the respondent is not a total denial that contempt of court was committed by his criticism of the Lord President but said that the words published were not calculated to obstruct or interfere with the course of justice or administration of law.

Raja Aziz on behalf of the respondent submitted that the circumstances which led to the contempt proceedings taken by the Malaysian Bar against the Lord President must be considered whether the criticism constitutes a contempt of court. Examining the background of these proceedings as deposed in the respondent's affidavit of 30 May 1990, he contended that the words published were not in the circumstances calculated to obstruct or interfere with the administration of justice.

He referred to the statements made by the Bar Council on 17 and 23 June 1988, and said that the tenor and comments of the Bar Council there was to uphold the dignity of the judiciary and public confidence in the administration of justice.

He submitted that when contempt proceedings were taken by the respondent against the Lord President the Malaysian Bar perceived that there was a threat against the judiciary. The acts which supported that belief were: (1) the Supreme Court was to convene on 2 July 1988; (2) the Lord President instructed the court to be locked; (3) the purpose was to impede access by Tun Salleh to the court.

He contended that it was the respondent's belief that those facts were sufficient to establish contempt against the Lord President within the principles found in *Raymond* v *Honey*.[22]

Raymond v *Honey*[22] is a case where Raymond, a prisoner serving a sentence of imprisonment, had applied for leave to the High Court to commit the governor of the prison for contempt. The governor stopped the prisoner's application. It was alleged that the governor had interfered or obstructed with due course of justice. The court found that the denial of the governor of the prisoner's right to access to the court constituted contempt of court.

In my view, the real position is that the respondent had wrongly relied his belief in *Raymond* v *Honey*[22] to establish contempt in his proceedings against the Lord President by reason that as distinct from *Raymond* v

Honey[22] the court of 2 July 1988 to which impede of access was alleged against the Lord President was an unlawfully constituted court. That the 2 July court sitting was unlawfully convened was decided by this court on 29 April 1989 in *Malaysian Bar* v *Tan Sri Dato Abdul Hamid*.[2] On that premise the attempt to impede access to it by the Lord President was negated as the court there constituted was unlawful. The respondent cannot say that he had not been forewarned of these eventualities by the earlier decision of the Tribunal issued on 23 September 1988, (the respondent affirmed his affidavit on 25 April 1989), but argued instead that the tribunal had considered only ss 38 and 39, but had not considered the effect of s 9 of the Courts of Judicature Act 1964. That argument has become academic. The fact remains that the respondent cannot disclaim knowledge that the operation of ss 38 and 39 of the Act would render his motion against the Lord President nugatory.

Section 9 of the Act referred to by the respondent provides for exercise of the Lord President's powers during his incapacity or absence. The respondent's belief in that circumstances was thus not founded.

Raja Aziz then referred to *A-G* v *Blomfield*; *A-G* v *Geddis*,[23] as a proposition that justification is a defence to a contempt of court. From the report of the case it seems that the reference to Stout CJ's and William J's judgment was expressed casually to the effect that if criticism is alleged to be contempt the court would be bound to allow the person charged to justify his criticism and bring forward evidence in doing so. It is however conceded in the judgment that there was no case cited where such practice has been followed.

Equally, I find no support in two other cases, *Leech* v *Dy Governor of Parkhurst Prison*,[24] and *Arthur Reginald Pereira* v *The King*,[25] cited by Raja Aziz on this topic, to be of assistance to the respondent.

The Attorney General on the other hand contended that the respondent's honest intention is no defence. Among the cases he cited are: *Yusuf Ali Khan* v *State*,[26] in which it was pleaded at the Bar that the language used in the affidavit was not used with any intention but nevertheless the allegations were justified, Hamoodur Rahman CJ quoting *Israr Hussin* v *The Crown* is reported to have said:

> No one can be allowed to defame, ridicule or abuse a judge in his public capacity even with the best of motives because if that sort of thing were once held to be permissible the whole judicial system would readily be brought into utter contempt.

R v *Collins*:[21] where the respondent in his affidavit in answer to the allegations against him affirmed his belief that he was entitled to put in facts to prove his allegation against the judge was true and that the matter was relevant to his case, Sholl J observed:

> ... It is a fallacy to suppose that nothing which is relevant can be so embroidered or added to or overladen with offensive matter as to constitute contempt of court. If by relevance is meant relevance in the strict sense, then violent abuse, unsubstantiated allegations of dishonesty, and attempted sarcasm or ridicule, directed at the court and its judges, cannot be relevant, because they cannot be regarded as reasonably and honestly put forward as the foundation of a serious and genuine argument.

Similar views have been expressed in *State* v *Nityananda Mohapatra*,[27] *State* v *Mujibur Rehman Shami & Ors*,[28] *Government Pleader* v *Mathai Manjooran & Anor*.[29] On this basis I would accept the Attorney General's contention as a proper statement of the law.

Raja Aziz also contended that the respondent's criticisms were relevant to his pleading in order to support his motion before the court. My view to that is, the rule of relevancy of evidence is not a licence to the respondent to be contumelious or to grant any litigant like him to advance contemptuous statements against the court or administration of justice. 'It is a fallacy to suppose that the respondent had that liberty or privilege' — see *R* v *Collins*.[21]

It is pertinent to note that the respondent's motion before the court was only to cite contempt against the Lord President but not to seek a remedy for the removal of the Lord President from office. The statement 'that the conduct of the Lord President deserved his removal from office' is in effect a declaration of the respondent's wilfulness in intent and purpose. It is not relevant to the present issue at hand.

To find contempt the court requires strict proof and before a contemner can be found in contempt, the act complained of must not only be wilful and calculated but must also be made with the intention of bringing the judge into contempt or casting suspicion on the administration of justice. Our own authorities have established that even where proceedings are not actually pending there can be contempt of court if there is a reflection upon the administration of justice in the country — see *PP* v *The Straits Times Press Ltd.*[30] It has been shown that the respondent's violent criticism of the Lord President would have that effect on the future administration of the law in the courts.

Our authorities have also established that when applying the law of contempt the court will not lose sight of local conditions and for that reason it would be 'necessary to take a stricter view here of matters pertaining to dignity of the court' — see *The Straits Times Press* case[30] and *PP* v *SRN Palaniappan & Ors*.[31]

Confining myself to the facts mentioned herein, I find that the criticism made by the respondent if repeated would undisputably undermine the authority of the Lord President and lower the dignity of the court in the eyes of the public.

Sentence

The respondent is found in contempt of court in his representative capacity as secretary of the Malaysian Bar in affirming an affidavit criticizing the Lord President.

The contemptuous words used in the respondent's affidavit are repetitions of similar criticism of the Lord President made by the Malaysian Bar at its meeting and similar statements made elsewhere.

The respondent's responsibility is, in our opinion, vicarious. Although this is not itself a defence in contempt proceedings against him, nevertheless it is a mitigating factor to be considered in his favour.

For these reasons we do not consider a custodial sentence appropriate. A fine of $5,000 in default three months' imprisonment would be sufficient in the circumstances. Each party to pay its own costs.

Gunn Chit Tuan SCJ: I have had the benefit of reading the previous draft judgments of my learned brothers, Justice Tan Sri Dato' Harum Hashim and Justice Dato' Mohamed Yusoff. It will be superfluous for me to repeat the facts of the case, but I would, however, make the following observations.

The affidavit affirmed by the respondent on 25 April 1989 contains accusations and allegations which in my view amounted to an attack on Chief Justice Tun Dato Abdul Hamid (as he then was), causing unwarranted and defamatory aspersions upon his character as a judge who was then performing and exercising the duties of the Acting Lord President in the administration of justice. The effect would be to bring the judge himself into contempt and to lower his authority as a judge. There is a limit to what a person may say or write of a judge or court. In my view, the respondent exceeded that limitation in his malignment of Justice Tun Dato Abdul Hamid in his said affidavit and was, therefore, guilty of contempt in scandalizing a court or a judge.

Our Parliament has not so far passed any law under art 10(2) of the Federal Constitution to impose on the right to freedom of speech and expression conferred by art 10(1) of the Federal Constitution any restrictions designed to provide against contempt of court except for s 13 of the Courts of Judicature Act 1964, which provides that the Supreme Court shall have power to punish any contempt of itself. The common law as administered in England on 7 April 1956, should therefore be applied in this case under s 3 of the Civil Law Act 1956. The judgment of Lord Russell of Killowen CJ in *R* v *Gray*[4] at p 40, which should be followed, is that 'Any act done or writing published calculated to bring a court *or a judge of the court* (emphasis supplied) into contempt, or to lower his authority, is a contempt of court. That is one class of contempt.' Lord Russell, however, added that 'that description of that class of contempt is to be taken subject to one and an important qualification. Judges and courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court.' The cricitism must, however, according to His Lordship, not be a personal scurrilous abuse of a judge as a judge.

Our attention was also drawn to the New Zealand case of *Re Wiseman*,[20] in which the New Zealand Court of Appeal has held that while judges and courts are alike open to criticism, statements made and published in affidavits and a notice of motion containing violent accusations against judges and imputing improper motives to them tend to lower the authority of the courts and to reflect on the integrity, propriety and impartiality of the judges and are clearly contempt of court. That New Zealand case adopted the following well-known words of Lord Atkin in the Privy Council case of *Ambard* v *A-G for Trinidad and Tobago*[32] at p 335:

> The path of criticism is a public way: the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.

Re Wiseman[20] therefore shows that the offence of scandalizing the court or a judge is not obsolete and is also punishable as contempt of court in another Commonwealth country with a common law background.

It was asserted by the respondent in para 19 of his affidavit affirmed on 30 May 1990, that the criticism of Justice Tun Dato Abdul Hamid's conduct was justified. Having considered the circumstances in which the words were uttered or published in the said affidavit, I would prefer to follow the persuasive authority of the Pakistan Supreme Court case of *Yusof Ali Khan* v *State*,[26] in which it was held, inter alia, that a legal practitioner can be guilty of contempt of court even for language professedly used in discharge of his functions as an advocate. I would also refer to the Australian case of *R* v *Collins*,[21] in which the Supreme Court of Victoria held that it is not a defence to a charge of contempt of court that the affidavit relied on as contemptuous is relevant to the proceedings in which it is made, if such affidavit goes beyond what any litigant could honestly and reasonably think to be no more than necessary or proper to establish a defence to the proceedings, or could honestly and reasonably consider to form the basis of a serious and genuine argument in the proceedings. I

would, therefore, hold that on the facts of this case, there was no justification for the criticisms in the affidavits affirmed by the respondent.

YM Raja Aziz, counsel for the defence, had submitted that the court must consider whether the words used were intended to obstruct or interfere with the course of justice. Counsel stated that the Attorney General had accepted what was said in the second tribunal and in the respondent's affidavits, and according to him, the starting point for consideration was the suspension of the former Lord President on 27 May 1988. He pointed out that the Bar Council had made statements immediately after that date, and its stand had been consistent after that. He asked the court to consider the tenor of the various statements made by the Bar Council which were marked as exhibits to the affidavit of the respondent dated 30 May 1990, and to note the stand taken by the Bar Council. In other words, it was contended that the respondent had acted honestly and in good faith in stating that stand, and was discharging his duty as secretary of the Bar Council. A reference was also made by counsel to the following passage in the judgment of Lord Radcliffe in the Privy Council case of *Arthur Reginald Perera* v *The King*[25] at p 488:

> Finally, his criticism was honest criticism on a matter of public importance. When these and no other are the circumstances that attend the action complained of, there cannot be contempt of court.

On the question of mens rea, Mr CV Das, the other counsel for the defence, referred to the Canadian case of *Re Ouellet*,[33] in which Hugessen ACJ of the Quebec Superior Court, in the exercise of its criminal jurisdiction, held that where contempt is one of scandalizing the court, mens rea is an element of the offence since criticism in good faith of judges of the courts must not be made the subject of contempt proceedings. But it must be pointed out here that there are conflicting lines of cases in Canada where this issue has been extensively litigated. Counsel also submitted that intention to scandalize the court had not been proved in this case and he contended that it must be proved beyond reasonable doubt. For that contention, he referred to *Re Bramblevale Ltd*,[34] in which the United Kingdom Court of Appeal held that where a person was charged with contempt of court, which was an offence of a criminal nature involving the liberty of the subject, his guilt must be proved beyond reasonable doubt.

The learned Attorney General on the other hand referred to the Pakistan case of the *State* v *Mir Abdul Qayum*[35] to support his submission that the intention of the respondent as a contemner was immaterial if the court is satisfied that the criticism amounts to contempt. It is interesting to note that in that case, the court also pointed out that if the Chief Justice was criticized in his administrative capacity, the criticism would amount to contempt known as scandalizing the court. The Indian case of *State of Hyderabad* v *Natarajan*[36] was also quoted by the learned Attorney to show that when a communication was scurrilous and offensive, it amounted to contempt of court by scandalizing it.

Yet another Indian case referred to by the learned Attorney was *State* v *Nityananda Mohapatra*,[27] in which the Orissa High Court held that remarks contained in a petition to the High Court for proceedings against a judge of the High Court in contempt was serious contempt and the intention of the contemner was no measure of whether an offence of contempt has really been committed.

In this case, there can be no doubt that the respondent intended to affirm the affidavits in question and in paras 7, 9 and 11 of the said affidavit dated 25 April 1989, there are, as already pointed out, statements containing accusations and allegations which were an attack on Justice Tun Dato Abdul Hamid causing unwarranted and defamatory aspersions on his character, which could be considered to be scurrilously abusive of the judge, thereby amounting to contempt by scandalizing the court. Even if the respondent was acting on instructions, he has read the statements in his affidavits and must accept responsibility for the contents. (See the Privy Council case of *Vijaya Wickramatunga Vidyasagara* v *The Queen*.[37])

Finally, it should be noted that although the Privy Council in *Debi Prasad Sharma* v *Emperor*[9] had expressed the opinion that cases of contempt which consist of 'scandalizing the court itself' are rare and require to be treated with much discretion, yet it proceeded on the footing that in proper cases the High Court in India has the power and jurisdiction to commit persons for 'scandalizing' the courts or judges. The Supreme Court of India in *Brahma Prakash* v *State of Uttar Pradesh*[10] at p 13 has also remarked that 'The observation of Lord Morris [in *Mcleod* v *St Aubyn*[3] at p 561] that contempt proceedings for scandalizing the courts have become obsolete in England is not, strictly speaking, correct; for, in the very next year, such proceedings were taken in a case reported in [1900] 2 QB 36 [*R* v *Gray*].' In so far as this country is concerned, because of our social conditions which are very different from those in England and more alike those in an Asian country within the Commonwealth such as India, the power and jurisdiction of our courts to commit persons for scandalizing the courts or judges should remain unless and until such time as, perhaps, the legislature might by statute decide to make such power obsolete.

In this country, since the Civil Law Act 1956, and the coming into force of the Federal Constitution in

1957, our courts have decided a few cases involving contempt of court. *A-G* v *Arthur Lee Meng Kuang*[5] and *Trustees of Leong San Tong Khoo Kongsi (Penang) & Ors* v *SM Idris & Anor*[6] are two of such cases. The defence had sought to distinguish those cases and contended that they are not applicable. But it is quite clear from those cases that this court has recently held that in deciding whether any criticism on a court or judge falls within the limits of reasonable courtesy and good faith, the court should not, however, lose sight of local circumstances and conditions. This was also the proposition laid down in *PP* v *The Straits Times Press Ltd*[30] and in *PP* v *SRN Palaniappan & Ors*[31] where Spenser Wilkinson J hesitated to follow too closely the decisions of English courts on the subject of contempt without first considering whether the relevant conditions in England and this country are similar.

For the reasons stated, I have to conclude that the respondent is guilty of contempt of court.

Application allowed.

Solicitors: *Jagjit Singh & Co; Thevin Chandran Siva Wong & Jamal; Presgrave & Matthews.*

Reported by *Prof Ahmad Ibrahim*

Yong Eng Kong & Ors v Ying Tien Ping

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO KG 198 OF 1990
HAIDAR J
11 SEPTEMBER 1990

Unincorporated Associations — Constitution — Powers of interim committee — Application for directions by members of association in respect of previous order of court — Non-compliance with Constitution of association — Allegation of failure to interpret consent order in line with the Constitution — Rules of the High Court, O 7 r 2

Words and Phrases — 'Approve'

The Foochow Association was bound by a consent order made in June 1990 in respect of a suit commenced against them in 1981. The consent order provided, inter alia, for the appointment of an interim committee who were to approve the membership of the association as at 22 April 1981 and arrange for a general meeting to be held to elect office bearers. The interim committee then determined that of the 680 members still remaining, 497 members were in arrears of subscription payments. An advertisement was then published in the Chinese press giving notice that all members who were in arrears of subscriptions were to settle them in order to be eligible to vote or to be qualified to hold office at a general meeting scheduled to be held on 17 September 1990. The interim committee then accepted payments of arrears of monthly subscriptions which in some cases dated back several years. The three plaintiffs then filed this application on behalf of themselves and 46 others against the chairman of the interim committee, seeking directions from the court in respect of the powers of the interim committee as set out in the consent order vis-a-vis the Constitution of the association. Article 13(3) of the Constitution provides that where a member's arrears of subscription exceeds two months, he shall receive written notification and shall be denied the privileges of membership until his account is settled; art 13(4) sets out that a member whose arrears exceed six months shall automatically cease to be a member of the association.

Held, deciding in favour of the plaintiffs:

(1) Considering that the onus is on the members to pay their subscriptions, it would appear that the use of the word 'shall' in art 13(3) is directory and not mandatory, and the failure to invoke art 13(3) does not mean that art 13(4) cannot be invoked. It is merely a reminder to the defaulting members of their obligations as members of the association to pay their subscriptions and no more.

(2) It is the obligation of every member to pay his subscription if he wants to continue to be a member and to exercise his rights within the province of the Constitution of the association. Article 13(4) clearly provides for membership to cease automatically when a subscription is in arrears of six months thereby indicating that such a member shall ipso facto cease to be a member of the association; there is a tacit resignation by such a member.

(3) Therefore the question of revival of membership by paying up all the arrears does not arise. In any event, there is no such express provision in the rules and the Constitution of the association giving power to the executive committee or for that matter the interim committee to so exercise for the main purpose of enabling defaulting members to pay up their arrears so as to enable them to vote at the coming general meeting, when in fact and in law they ceased automatically to be members of the association. However, art 13(5) gives the power to the executive committee to fix a re-entrance fee for such members who allowed their membership to cease through arrears of subscriptions. This is the only way for them to come back as members of the association and not otherwise. To allow those defaulting members to revive their membership by paying up their arrears as was done in this case by the interim committee would be nugatory of art 13(4).

(4) As regards the approval of the membership register as at 22 April 1981, the interim committee must approve, that is to confirm authoritatively, only the list of members who are not in arrears and are not in default of any provisions of the rules and Constitution of the association. Only those members who are not in arrears in their subscriptions and are not caught by art 13(4) of the association are entitled to attend and vote at the coming general meeting of the association and be elected as well to the executive committee. The action of the interim committee in inviting the defaulting members to pay the arrears of their subscription is beyond the scope of the terms of reference under the consent order.

(5) In view of the court's decision, it was unnecessary for the court to make an order for the extension of the holding of the general meeting. In view of the bona fide belief of the interim committee that they were acting within the scope of reference of the consent order vis-a-vis the Constitution of the association, no order was made as to costs.

[Bahasa Malaysia summary

Persatuan Foochow diikat oleh satu perintah persetujuan yang dibuat pada Jun 1990 bersangkutan dengan satu guaman yang dimulakan terhadap mereka dalam 1981. Perintah persetujuan itu memperuntukkan, antara lain, untuk perlantikan satu